



OFFICE OF THE  
DEPUTY UNDER  
SECRETARY OF  
DEFENSE  
(ENVIRONMENTAL  
SECURITY)

# Early Transfer Authority

A September 1996 amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows Federal agencies to transfer property before all necessary cleanup actions have been taken. This provision (§120(h)(3)(C)), known as early transfer authority (ETA), authorizes the deferral of the CERCLA covenant requiring all remedial actions to be completed before Federal property is transferred when the findings required by the statute can be made and the response action assurances required by the statute are given. The Governor of the state where the property is located must concur with the deferral request for property not listed on the National Priorities List (NPL). For NPL property, the deferral must be provided by the Environmental Protection Agency (EPA) with the concurrence of the Governor. Please note that ETA is not an actual conveyance mechanism and that an existing transfer authority, such as the economic development conveyance, will have to be used to transfer the property.

## ***CERCLA §120(h)(3)(C)***

### **Deferral of the CERCLA covenant is based on a finding that:**

- I. The property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;
- II. The deed or other agreement proposed to govern the transfer between the U.S. and the transferee of the property contains the assurances set forth in clause (ii);
- III. The Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for the transfer; and
- IV. The deferral and the transfer of the property will not substantially delay any necessary response action at the property.

### **Component must provide the following response action assurances:**

- I. Any necessary restrictions on the use of the property to ensure the protection of human health and the environment;
- II. There will be restrictions on the use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;
- III. All necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and
- IV. The Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations.

The Department of Defense (DoD) plans to use ETA to assist communities in expediting the reuse of former defense facilities. By enabling local reuse authorities (LRA) and other stakeholders to obtain full ownership of property earlier, these parties gain greater control over the future of their community.

Detailed guidance on the environmental review process for NPL property has been issued by EPA, and DoD has issued guidance for non-NPL property. These guidances must be used in conjunction with any ETA guidance that may have been issued by the state. The environmental review process for non-NPL property is documented in a finding of suitability for early transfer (FOSET), which is similar to the existing finding of suitability to transfer and finding of suitability to lease processes. EPA elected to call the document for NPL properties a covenant deferral request because the NPL ETA guidance also applies to Federal agencies other than DoD. While the emphasis in this fact sheet is on the FOSET for non-NPL property, both documents contain similar information and serve to document the environmental suitability of the property for an early transfer. The process described in this fact sheet should be used by DoD Components for both NPL and non-NPL properties. This fact sheet lays out the steps and documentation specifically needed for obtaining a signed FOSET for the early transfer of non-NPL property.

### ***Acronyms***

<b>BCT</b>	BRAC Cleanup Team
<b>BRAC</b>	Base Realignment and Closure
<b>CERCLA</b>	Comprehensive Environmental Response, Compensation, and Liability Act
<b>ETA</b>	Early Transfer Authority
<b>FOSET</b>	Finding of Suitability for Early Transfer
<b>ICs</b>	Institutional Controls
<b>LRA</b>	Local Reuse Authorities
<b>NPL</b>	National Priorities List
<b>ODUSD (ES/CL)</b>	Office of the Deputy Under Secretary of Defense for Environmental Security/Cleanup
<b>RAB</b>	Restoration Advisory Board



### Pre-Transfer

#### 1 Assemble a Review Team

Once the LRA or prospective purchaser has contacted the DoD Component and formally indicated an interest in obtaining property, the DoD Component should assemble a review team to develop the FOSET package. For Base Realignment and Closure (BRAC) property, the review team should consist of the BRAC cleanup team (BCT), the supporting real estate office, and the transferee. For non-BRAC property, the review team should consist of representatives of the Component's environmental cleanup office, the state environmental regulatory agency (and EPA, for NPL property), the General Services Administration, and the transferee.

The prospective transferee should coordinate with the Component to identify potential property that will be suitable for transfer using ETA prior to a formal request for the property. In the request, the potential transferee would specify an intended use for the property: this intended use would be the basis of the FOSET.

To develop the FOSET and transfer property using ETA, all team members must be committed to working collaboratively, on a consensus basis, to identify and resolve problems early. The installation-level team must ensure that throughout the process there is good communication among the team members, and that the Component chain-of-command is kept apprised of the developments. Early transfer cannot work without a willing buyer, agreement from regulatory agencies, and support from the DoD Component.

#### 8-Step Process

##### Pre-Transfer

- 1 Assemble a review team
- 2 Identify information and develop plan
- 3 Coordinate with Governor's Office
- 4 Develop FOSET
- 5 Invite public participation
- 6 Develop responsiveness summary and submit FOSET

##### At Transfer

- 7 Transfer property and notify

##### Post-Transfer

- 8 Provide the CERCLA Covenant

#### 2 Identify Information and Develop a Plan

The review team should identify the available information on the property and should determine what additional information is needed for the FOSET, based on the intended use. The team should develop a plan and schedule for the draft FOSET and discuss post-transfer responsibilities (see Box 1). These responsibilities include the use restrictions or institutional controls (ICs) that will be needed during cleanup and once the remedy has been selected.

If the transferee will be performing the cleanup of the property, the DoD Component must provide prior notification to the Office of the Deputy Under Secretary of Defense for Environmental Security/Cleanup (ODUSD(ES/CL)) before submitting the ETA request to the Governor and final notification after the transfer. In the initial notification, the DoD Component will provide ODUSD(ES/CL) with assurance that the transferee has the financial and technical capabilities for performing the required remedial actions and will explain how the Component intends to ensure that the transferee completes the required cleanup. If the transferee is not performing the cleanup, the DoD Component need not notify ODUSD(ES/CL) until after the property is transferred.

#### Post-Transfer Responsibilities

- ICs needed during cleanup
  - Who will determine?
  - How will they be implemented?
  - How will they be monitored/maintained?
  - How will they be discontinued?
- How will the CERCLA covenant be conveyed to the transferee after cleanup?
- ICs needed for the remedy
  - Who will determine?
  - Who will implement and maintain?
  - Who will insert the deed?

**Box 1**

#### 3 Coordinate with Governor's Office

The DoD Component should notify the Governor of the intent to request a deferral of the CERCLA covenant and should formally invite the participation of the Governor's Office in the development of the FOSET. The interested parties (DoD, the state, and the transferee) should prepare a schedule to coordinate the review of the FOSET. The schedule should include the proposed date of the Governor's concurrence on the FOSET.

## 4 *Develop FOSET*

### **FOSET Packet Sent to Governor**

1. **Cover Letter** to the state asking for deferral
2. **FOSET**
  - Component finding of suitability
  - Property description
  - Description of nature and extent of contamination
  - Analysis of intended future land use
  - Response/corrective action and operation and maintenance requirements
3. **Deed Language**
  - Notice
  - Covenant
  - Access clause
  - Response action assurances
  - Other
4. **Responsiveness Summary**

**Box 2**

## 5 *Invite Public Participation*

Once the draft FOSET has been prepared, a notice must be placed in the local newspaper and the public must be given 30 days to comment on the transaction. The draft FOSET, when available, should be provided to the restoration advisory board (RAB), other community groups expressing interest, and the state environmental regulatory agency.

## 6 *Develop Responsiveness Summary and Submit FOSET*

After the public comment period has ended, the DoD Component should respond in writing to the public comments received. The FOSET packet submitted to the Governor should include a cover letter from the DoD Component asking for deferral of the CERCLA covenant, the FOSET, the deed language, and the responses to public comment (known as the Responsiveness Summary) (see Box 2). Once the Governor has signed the FOSET, the community should be informed through publication in a newspaper where the FOSET is available for review.

## At Transfer

### 7 *Transfer Property and Notify*

Once the Governor has concurred on the FOSET, the property may be transferred. The DoD Component must notify the ODUSD(ES/CL) that a property transfer using ETA has occurred and that the Component has adequate funding and has provided the required response action assurances.

## Post-Transfer

### 8 *Provide the CERCLA Covenant*

When remedial actions have been completed or when the approved remedy for the site has been implemented and is operating properly, the DoD Component shall provide a warranty document amending the deed to the transferee stating that all remedial action has been taken in satisfaction of CERCLA §120(h)(3)(A)(ii)(I) (see Box 3).

If the transferee has performed the cleanup, the transferee must notify the DoD Component that all remedial action has been completed and must allow DoD to enter the property and inspect the site. The transferee must also give DoD access to all remedial action reports and sampling data (see Box 3).

After DoD has reviewed the available documentation, inspected the site, and agreed with the transferee's assessment that all remedial action has been completed, the DoD Component will provide the CERCLA covenant.

When amending the deed to provide the CERCLA covenant, the DoD Component must also ensure that the use restrictions necessary for the implementation of the remedy have been included in the deed. These restrictions must be binding on the transferee and any future owner of the property.

### **CERCLA Covenant (§120(h)(3)(A)(ii)(I))**

"All remedial action necessary to protect human health and the environment with respect to any hazardous substance remaining on the property has been taken."

### **After Transferee Performs Cleanup:**

- Notify DoD that all remedial action has been completed
- Allow DoD to inspect site
- Provide DoD with copies of remedial action reports and sampling data

**Box 3**



## Grissom Air Force Base: A Successful Use of ETA

On July 1, 1997, DoD used ETA to transfer 201 acres of Grissom Air Force Base to the State of Indiana for use as a medium-security prison. The property included 16 facilities, including a water supply building, a small-arms firing range, a communications building, and a storage and maintenance building.

The property had groundwater and soil contamination from household and industrial wastes, spent solvents, fuels, waste oil, pesticides, lead, silver, munitions, and asbestos. Areas of concern included abandoned water wells, a grenade training range, and a hazardous waste accumulation point.

The FOSET documented the presence of hazardous substances and contamination on the property and the environmental impacts anticipated with the intended use of the property. The FOSET also included a schedule for cleanup of each area of concern and a description of the necessary ICs. ICs consisted of restrictions on the use of groundwater from the upper aquifer and structural controls to prohibit access to the environmental areas of concern.

Today, DoD's environmental cleanup of the property continues while the State of Indiana is building a much-needed correctional facility. The last cleanup remedy is due to be implemented in September 1998, and long-term groundwater monitoring is estimated to continue for 30 years.

### **Where to learn more:**

The following documents on ETA Guidance and ICs can be found on the BRAC Environmental Cleanup Web Page (<http://www.dtic.mil/envirodod/brac/>):

- DoD Non-NPL ETA Guidance
  - Environmental Review Process to Obtain the Finding of Suitability Required for Use of Early Transfer Authority for Property not on the National Priorities List
- Institutional Controls
  - DoD Future Land Use Policy (25 July 1997)
  - BRAC Environmental Program Fact Sheet: *Institutional Controls: What They Are and How Are They Used* (Spring 1977)
  - *A Guide to Establishing Institutional Controls at Closing Military Installations*, February 1998

The EPA NPL ETA guidance (*EPA Guidance on the Transferred Federal Property by Deed Before All Necessary Response Action Has Been Taken Pursuant to CERCLA §120(h)(3)*) and other information on environmental cleanup can be found at EPA's Federal Facilities Restoration and Reuse Office Web Page (<http://www.epa.gov/swerfrr/>)

We welcome and invite your comments on this fact sheet as we seek ways to improve the information provided.  
Please send comments to the following address:

**OADUSD (Environmental Cleanup)**  
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Washington, DC 20301-3400